Because the facts in *V.A.M. Hussain's* case are distinguishable from the instant case *Mary Michael's* case would apply. In the instant case the sum sought to be satisfied is the aggregate sum consisting of the balance of the principal together with interests accumulated as at that date. Therefore Form 16D should have been used by the applicant and not Form 16E.

In my view the application is defective also on the grounds that an exact amount is not specified in the application. The sum of $1,419,749.88 alleged to be due as at 15th April 1974 reflects as I pointed out earlier the balance of the principal together with interest accrued so far but the application also asks for a further sum (unspecified) which is alleged to constitute additional interest at the rate of 12% per annum with yearly rests as from the 16th day of April 1974 to the date of payment or realisation. Section 257(1)(c) of the National Land Code provides that every order for sale shall specify the total amount due to the chargee at the date on which the order is made. The question what would happen if the chargee in *Mary Michael's* case had issued the notice in Form 16E was raised by Gill F.J. (as he then was) in his observations at page 173. He said the chargor could perhaps have successfully argued that the form was inapplicable on the ground that the chargee was also including in the notice the amount of interest due on the charge. It is to be observed that neither in section 255(1) of the National Land Code nor in the form itself is there any mention of interest. But this question did not fall to be decided in *Mary Michael's* case because the chargee in that case had chosen to issue a notice in Form 16D which as the Lord President pointed out he was entitled to do.

Clause 1 of the memorandum of charge in question (Exhibit "A1" in the affidavit of the applicant affirmed on the 22nd of May 1974) reads: —

"1. The Chargor(s) will on demand covenant to pay to the Chargee

(a) the sum of Dollars One Million Six hundred thousand ($1,600,000.00) (hereinafter referred to as 'the Loan') together with interest thereon (as well after as before any court order or judgment) at the rate of ten per centum (10%) per annum (hereinafter referred to as 'the Interest Rate');

(b) all other sums and moneys as are or may become payable by the Chargor(s) under this Charge and, without limiting the generality of the foregoing, in particular all the costs charges expenses and other sums and moneys mentioned in Clause 31 hereof. . . ."

It is clear that the covenant to pay set out in clause (1) of the deed is outside the scope of section 255(1) of the National Land Code. The respondent defaulted in the payment of instalments in the terms of clause (5) of the deed. It is clearly set out in clause (33) of the deed that in the event any breach by the chargor of any "agreement, covenants, terms, stipulations and undertakings" provided in the deed accruing and continuing for a period of not less than seven days it shall be lawful for the chargee forthwith to give *notice to the chargor under section 254 of the National Land Code.* To my mind it is obvious therefore that the applicant himself had covenanted to proceed in the first instance under section 254 of the National Land Code although under the proviso to that clause it is provided that the chargee shall not be deprived of its rights under section 255 of the National Land Code. The intention of clause (33) of the deed is that the parties themselves agreed that the procedure under section 254 or section 255 of the Code shall apply as circumstances may require.

For the above reasons I dismiss the application with liberty to reapply after notice in Form 16D is served on the respondent. Costs to respondent in any event.

Application dismissed.

Solicitors: *Ong & Co.; Presgrave & Matthews.*

ISMAIL BIN AWANG v. PUBLIC PROSECUTOR

[A.Cr.J. (Abdul Razak J.) September 22, 1974]
[Kuala Trengganu — Criminal Appeal No. 7 of 1974]

Criminal Law and Procedure — Charge of using a motor vehicle as a public service vehicle without licence — Penal provision — To be strictly construed — Evidence of observations by police — Contradiction in material particulars — Evidence of defence throwing doubts on prosecution evidence — Road Traffic Ordinance, 1958, ss. 74(1), 92(1) and 144.

In this case the appellant had been convicted of the offences of using a motor vehicle as a public service vehicle and failure to have it covered by third party insurance. The evidence adduced against the appellant at the trial consisted of observations made by the police over a period of twenty-five days. Although two police constables were detailed to carry out the observations, only one of them gave evidence in court. The appellant was eventually arrested and he and the passengers in the motor vehicle were taken to the police station. There were contradictions in material particulars in the evidence of the police constable and on the other hand the passengers found in the motor vehicle gave evidence and supported the appellant's evidence that no money was paid.

Held: the defence evidence in this case had thrown doubts on the prosecution evidence and the conviction of the appellant should therefore be quashed.

Cases referred to:-

(1) *R.* v. *Prater* (1960) 44 Cr. App. R. 83.
(2) *Reg.* v. *Birtles* [1969] 1 W.L.R. 1047.

CRIMINAL APPEAL.

Porres R. Royan for the appellant.

Datuk Abu Mansor (Deputy Public Prosecutor) for the respondent.

Abdul Razak J.: This is an appeal against the decision of the learned magistrate given on the 17th February, 1974, wherein the appellant was charged for offences under section 92(1) and 74(1) of the Road Traffic Ordinance. He was found guilty of both the charges and fined $200 and $100 respectively. He was disqualified from driving and his driving licence was suspended for a period of one year. His motor vehicle was forfeited.

The facts of the case were quite simple. It was one of those common cases where pirate taxis were said to be used as public service vehicles and observations were made by the Police to detect the crime. On this occasion two police constables were detailed as usual to carry out the mission on the instruction of his superior. However, only one of them

gave evidence. He, PW1, said he took his position on a number of places and jotted down in his diary the scene of the vehicle in question as it sped passed him. The vehicle number was BN 116. The driver was the accused. The places he visited and took his positions were about four in number and these were along the road from the camp to Seberang Takir, Kuala Trengganu. He could see the vehicle in question carrying different passengers each time plying between these two places. These observations apparently were made for 25 days from the 6th to the 31st October, 1973. On the 31st the alleged pirate taxi career of the accused came to grief because the police constable finally decided to close his diary and arrest him. This he did in front of the Sekolah Menengah Kebangsaan with three passengers on board which he followed by making a Police Report.

Before me the appellant raised a number of grounds why he said the magistrate should not have made the decision which he did. Suffice for me to say that they did not squarely deal with the problem that had been worrying me ever since.

The case for the prosecution depended solely if not largely on the observations made by the Police by virtue of which they said the accused was a taxi driver. These observations they said were the foundation for the presumption under section 144 of the Road Traffic Ordinance, failure to rebut which rendered the accused guilty. For the presumption to rise it is quite simple. A vehicle is deemed to carry persons, however innocent they may appear to be, for hire or reward. The provision is harsh, but that is the law. It is difficult to catch breakers of this type of offence otherwise. It is clearly thus seen that the burden of proof on the prosecution was a very light one; in comparison the one cast on the defence was very heavy. In the latter case it must necessarily involve getting the persons carried who may not be civil or civic enough to assist. Everyone hates to be in court and be inconvenienced. And yet failure to do so may either render the individual losing his driving licence or his vehicle or both. The punishments are intended to be severe. They however, affect the lives and property of the individual. But such is the state of the legislation that I cannot help feeling that it must have been within the contemplation of the legislature that in applying the law the statute must be strictly construed. That in applying the law to the facts, the facts must be strictly proved. This is especially so, as in this case, if it is a penal statute. As *Maxwell* said (at page 239 — 12th Edition):

"The principle applied in construing a penal Act is that if, in construing the relevant provisions, 'there appears any reasonable doubt or ambiguity,' it will be resolved in favour of the person who would be liable to the penalty.... The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction."

At page 251 he has this to say on encroachment of right of property:

"Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction in the same way as penal Acts. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights."

Bearing these principles in mind I think we can proceed to ask the question — Was the evidence led by the prosecution such as to justify a reasonable inference that the appellant was guilty? In my view, with great respect, there was no such evidence. If there was any evidence, it was not free from doubt, suspicion and scrutiny. The evidence of the prosecution rested solely on the evidence of PW1 and on him alone. None of his colleagues, although they were with him at the relevant times, were called to corroborate him or to show his consistency. For reasons only known to them the prosecution chose not to call them, a decision which I feel was disastrous to them. In my opinion the prosecution must prove the foundation for their presumption strictly to ground their charge and if they failed to do so and some doubt was caused as to whether their evidence was credible then the accused was entitled to the benefit of the doubt. Which leads me to the most important aspect of my finding and that is that if some doubt at all was inherent in the evidence of the prosecution witness then it was incumbent upon the court to warn itself of the danger of accepting the evidence uncorroborated.

In my view the evidence of PW1 was such that a vigilant magistrate would and should have carefully safeguarded himself. I shall explain the reasons.

Firstly there is a doubt which of the many observations made by PW1 were true and which were false. By the evidence, the observations made only told half the truth. According to PW1, 90 observations were made in all. The record actually showed only 84. This could have been an honest mistake. If it was one it was strange no attempt was made to correct the error. PW1 would appear, therefore, to have told a lie. If he was not, then what was the mystery surrounding the remaining 6? What has happened to them? Was it not probable and possible that they were unfavourable to the prosecution and therefore been held back? The circumstances, in the absence of any explanation, seemed to point that way. At any rate the possibility could not be summarily excluded. However, the learned magistrate's decision did not seem to indicate that he was aware of this conflict and considered it or if he had warned himself of the danger caused by this falsity. It could not be denied that as a basis it was a vital piece of evidence without which there would be a big gap in the chain of the prosecution evidence.

Secondly, PW1 testified that on the 29th October at 10.25 a.m. he was in front of the Sekolah Menengah Seberang Takir, when he saw the car BN 116 coming from the direction of Seberang Takir going towards the camp. However, he said at the same time and on the same day he saw the same car moving the opposite direction. How a vehicle could be proceeding in two different directions at the same time, I scarcely know. No attempt was again made to correct the situation. One can only assume it was a legitimate statement of fact. But it was not difficult to see that the learned magistrate had not alerted himself to an absurdity. It seemed clear that the opportunity did not present itself to him.

Thirdly, PW1 stated he made 90 observations altogether within a period of 25 days. By the strict construction of section 144 even the carriage of two persons on one occasion could cause the presumption to arise. Decided cases had shown of observations made which never exceeded 14 days. In my own experience none had extended to such a long period of time. What was the reason for the long delay and laborious undertaking before PW1 finally decided to wrap up his investigations? The answer was even more cogent since the Police must have known that with every day that passed lives and property might be lost with none the better for it. Could it be that the Police had a reason of its own for dragging its feet? The possibility of collusion could not be entirely excluded. This was something which was not impossible. Policemen are not infallible. And it would not appear to be inconsistent with the arrest either because the consideration for it might have broken down.

When one considered all these three factors against the fact that the police constable had contradicted himself about the number of observations he made, it seemed clear that each incident seemed to corroborate or to be consistent with the other and *vice versa* as showing that PW1 might have a reason of his own for contradicting in one and acting in the other and therefore that his evidence ought to be corroborated or the court ought to warn itself of the danger of noncorroboration. As was stated in *R.* v. *Prater*[1] that: —

"where it appears that a witness, whether a co-prisoner or a Crown witness, may have some purpose of his own to serve in giving evidence, it is desirable in practice that a warning should be given to the jury with regard to the danger of acting on his uncorroborated evidence similar to that which is given in the case of accomplices, whether the witness can properly be classed as an accomplice or not".

In my opinion evidence by public officers who hold themselves out as having the authority to apprehend by means of a system members of the public for offences involving their property ought to be received with a great deal of care and caution by magistrates especially when there appeared to be contradictions in material particulars, since the possibility of collusion cannot be entirely excluded. They ought to seek for corroboration or warn themselves of the danger of not requiring one.

Perhaps it is opportune and not too late to suggest that the Police consider seriously that if the giving of evidence they must for prosecuting this type of offence then perhaps it is timely that the age-old method of crime detection by observation be reviewed in favour of a somewhat more direct, positive but nevertheless safer method. On this point it may perhaps be worthwhile to direct their attention to the principle laid down in *Regina* v. *Birtles*.[2] But it is certainly ludicrous to suggest that for the purpose of section 144 of the Road Traffic Ordinance it was the intention or within the contemplation of the Legislature that private vehicles should be allowed to ply up and down the public road as public conveyance under the watchful eye of the Police for exceedingly long periods of time with full knowledge of the dire situation in which the passengers or their next of kin would land themselves in, having no compensation to content with in the event of a catastrophe. Perhaps an amendment to the law to bring this about may be necessary.

Against this rather unsatisfactory evidence is the evidence of the defence itself. The defence called all the ladies in the car to give evidence. These people said they were taken to the Police Station immediately after the arrest where their statements were taken. The Police had a good reason for the urgency. They wanted to get the best evidence and untampered with. But these people have come out with statements saying that they never paid any money nor promised any. The accused said it was a gratuitous lift. Probably in their haste, the Police acted too quickly because these people said they were going to the camp or somewhere else but not the place where they were asked to get down. So there was, if they in fact wanted to pay, no fact of payment. The evidence being what it was there was no reason for suggesting that the ladies' evidence or the accused's evidence were not believable. Their evidence would have been tested against the statements which they made to the Police earlier if they had said differently. The Police could have impeached them. Besides if there had been any payment or promise of one the Police would have known it because one of them got on the bus together with the ladies and got down with them. He would have heard of any negotiations for fares. He heard nothing. At any rate he did not say so. It is very strange that if they were going to pay fares no one uttered a word as to how much they had to pay either before boarding the vehicle or during it. It is not known whether the police constable was in uniform. If he had it was very likely that the passengers would not have travelled with him.

Considering the whole of their evidence which was never seriously challenged or contradicted against the Police evidence which was highly critical, but which the learned magistrate never apparently had the opportunity to consider, could it not be said that the defence had given a story which was consistent with the truth and their innocence? With respect, I think they have.

The defence duty in a case of this nature bearing in mind the principles earlier stated was to create some doubt in the prosecution's case. Once that was done which I think they had then the benefit of the doubt must be given to the accused.

I allow the appeal therefore and order that the conviction and sentence be set aside. I order that an order of acquittal and discharge be substituted instead.

Appeal allowed.

Solicitors: *Wan Mustapha & Co.*